No. 22165

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETER ANTHONY NOGA

APPELLANT,

v.

UNITED STATES OF AMERICA

APPELLEE

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
HE NORTHERN DISTRICT OF CALIFORNIA

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# BRIEF FOR APPELLANT

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## JURISDICTIONAL STATEMENT

This is an appeal from the judgment entered in favor of the appellee, the United States of America, on August 2, 1967, by the United States District Court for the Northern District of California, pursuant to said Court's order granting appellee's motion for summary judgment. The complaint for damages was brought by the plaintiff, Peter Anthony Noga, for personal injuries under the authority of the Federal Torts Claim Act, 28 U.S.C. Sections 1346 (b) and 2671-80 (R. 1). The District Court's jurisdiction was invoked under 28 U.S.C.§ 1346 (b) (R. 1). On July 7, 1967, the District Court ordered that appellee's motion for summary judgment be granted and that judgment be entered in favor of appellee (R. 96-99). Appellant filed a timely notice for appeal on

August 7, 1967. The Court's jurisdiction accordingly rests upon 28 U. S. C.§1291.

## STATEMENT OF THE CASE

On August 24, 1964, appellant, a forestry aid for the United States Government, sustained severe personal injuries in an automobile collision rendering him a quadriplegic while an occupant in an automobile operated by Dennis Bruce, a fellow employee, in the course and scope of their employment with the United States (R. 1-3, 22).

A complaint seeking general damages in the sum of $1,000,000.00, medical expenses, and loss of earning power was filed on August 22, 1966 by appellant against the United States (R. 1-3). Appellant alleged that the injury was caused by Dennis Bruce in the operation of his motor vehicle in the course and scope of his employment. The complaint contains allegations of negligence and wilful misconduct (R. 1-3).

On August 24, 1966, the Bureau of Employees Compensation entered its determination that plaintiff was entitled to compensation under the Federal Employees Compensation Act (5 U. S. C.§§751-802) upon a finding that the injuries were incurred by plaintiff in the performance of his duties as a forestry aid for the United States of America (R. 11, 23).

United States filed a motion for summary judgment on December 22, 1966 on the grounds that plaintiff's only remedy against the United States is under the Federal Employees Compensation Act (R. 10-12). Said motion was granted by the District Court on July 7, 1967 (R. 96-99). This appeal follows (R. 101).

## SPECIFICATION OF ERROR

The granting of motion for summary judgment on the grounds

that appellant is precluded from recovery against the United States because of the exclusive remedy provision of the Federal Employees Compensation Act ( 5 U. S. C. §757b ) is error. A federal employee can recover in tort against the United States for injury sustained as a result of the negligent operation of a motor vehicle by a fellow federal employee in the course and scope of their employment pursuant to the dictates of the Federal Drivers Act.

## SUMMARY OF ARGUMENT

Prior to the enactment of the Federal Drivers Act, amending the Federal Torts Claim Act in 1961, the Federal Employees Compensation Act, 5 U. S. C. §§ 751-802, was the exclusive remedy against the United States by civilian employees for personal injuries sustained in the performance of their duties. See 5 U. S. C. §757 (b). Before 1961, such employees clearly had a common law right to recover against their fellow employees in tort, even though both were acting within the course and scope of their employment for the United States. Allman v. Hanley, 302 F. 2d 599 (5th Cir. 1962) and Marion v. United States, 214 F. Supp. 320 (Md. 1963).

In 1961, the Federal Drivers Act was enacted by Congress providing that suit against the United States shall be the exclusive remedy for injuries resulting from the operation of a motor vehicle by a government employee within the course and scope of his employment. The 1961 enactment establishes a procedure for substituting the United States as a defendant in place of the government driver. The clear intent of Congress in enacting the Federal Drivers Act is to protect the federal driver from financial disaster by shifting the financial

responsibility from the driver to the federal government while not depriving injured persons of their judicial remedies for the injuries. Congress did not at any time express any intent to repeal the common law right of an injured federal employee who has received compensation under the F.E.C.A. of his judicial remedy against his fellow employee for the operation of the motor vehicle. Historically, the Federal Courts do not abrogate common law rights unless expressly directed to do so by Congress. See Marion v. United States, supra, and Allman v. Hanley, supra.

The optimum interpretation and construction of the statutory provisions in question is one that accomplishes the ends of Congress in enacting the Federal Drivers Act while at the same time preserving the judicial remedy in tort of the injured federal employee. The only way that this can be accomplished is to allow the injured federal employee to proceed against the United States as a technical defendant substituted in place of the negligent federal driver.

Such an interpretation not only carries out the purpose of the Federal Drivers Act in protecting federal employees but avoids the unjust and inequitable result of denying recovery solely upon the ground that the injured party is an employee of the United States. Such an interpretation avoids the illogical denial of a judicial recovery based solely upon the fortuitous fact that the injury was a result of a vehicular accident rather than a non-vehicular accident. The reversal of the judgment of the Court below follows the recent Supreme Court decisions of Jackson v. Lykes Steamship Co. 386 U.S. 731, 18 L.ed. 2d 488, 87 S.Ct. 1419 (1967) and Reed v. Steamship Yaka, 373 U.S. 410, 10 L.ed.

2d 448, 83 S.Ct. 1349 (1963) where recovery was permitted for a traditional common law remedy by refusing to apply a federal statute establishing compensation benefits as the exclusive remedy against the employer. Further support is found in <u>Richmond Screw Anchor Co. v. United States</u>, 275 U.S. 331, 72 L.ed. 303, 48 S.Ct. 194 (1928) compelling recovery under analogous circumstances so as to avoid an unconstitutional construction of federal statutes.

## APPLICABLE STATUTORY PROVISIONS

1. 28 U.S.C. §2679, as amended in 1961 (hereinafter referred to as the Federal Drivers Act) at the time of the accident provided:

> "(b) The remedy by suit against the United States as provided by section 1346 (b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.
>
> "(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an

"attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

"(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

"(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect. June 25, 1948, c. 646, 62 Stat. 984; Sept. 21, 1961, Pub. L.

87-258, §1, 75 Stat. 539."

2. 5 U.S.C. §757 (b) at the time of the instant accident provided as follows:[1]

> "The liability of the United States or any of its instrumentalities under this act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceeding in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any federal tort liability statute: provided, however that this section does not apply to a master or a member of the crew of any vessel."

---

[1] 5 U.S.C. §757 (b) is now contained in the Federal Compensation Act as 5 U.S.C. §8116 (c). The change was part of the recodification of Title 5 of the U.S.C. See Publ. 89-554, 80 Stat. 378, September 6, 1966.

87-258, §1, 75 Stat. 539."

2. 5 U.S.C. §757 (b) at the time of the instant accident provided as follows:[1]

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## ARGUMENT

### A. PRIOR TO THE 1961 ENACTMENT OF THE FEDERAL DRIVERS ACT, FEDERAL EMPLOYEES HAD A COMMON LAW RIGHT TO RECOVER DAMAGES FOR PERSONAL INJURIES IN TORT FROM A FELLOW EMPLOYEE EVEN THOUGH BOTH WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR FEDERAL EMPLOYMENT.

Civilian employees of the federal government are entitled to compensation benefits under the Federal Employees Compensation Act for disability or death of an employee resulting from personal injuries sustained while in the performance of his federal duties. 5 U.S.C.§ 8102 (formerly 5 U.S.C.§751). As originally enacted in 1916, the F.E.C.A. did not contain any language specifying it to be the federal employees' exclusive remedy against the United States. Of course, such language was unnecessary at that time because there was no other remedy available, as the United States was fully protected by the doctrine of sovereign immunity. The exclusive remedy provision was enacted in 1949 as a result of the development of the election of remedies doctrine in earlier cases under the Federal Torts Claim Act. See <u>Dahn v. Davis</u>, 258 U.S. 421, 66 L.ed 696, 42 S.Ct. 320 (1919), <u>United States v. Marine</u>, 155 F. 2d 456 (4th Cir. 1946), <u>Johnson v. United States</u>, 186 F. 2d 120 (4th Cir. 1950), <u>Parr v. United States</u>, 172 F. 2d 462 (10th Cir. 1949), <u>Cannon v. United States</u>, 188 F. 2d 444 (9th Cir. 1951), <u>Ocasio v. United States</u>, 99 F. Supp. 601 (D.P.R. 1951), <u>Brown & Root v. United States</u>, 92 F. Supp. 257 (S.O. Tex. 1950). The election of remedies doctrine was aptly stated in <u>Parr v. United States</u>, <u>supra</u>, at pages 463-464:

> "When the Federal Torts Claim Act became effective, [the employee-claimant] had two remedies, each for the same wrong, and both against the United States. One was under the Employees Compensation Act, and the other was under the Torts Claim Act. He then had the option to select either remedy and follow it through. But he could not invoke both. Effectively invoking constituted an election which would preclude resort to the other."

If an employee elected not to proceed for compensation, suit would lie under the Federal Torts Claim Act. Cannon v. United States, supra.

In 1949 Congress added a section to the F.E.C.A. expressly providing that the compensation remedy shall be the exclusive remedy against the United States for injuries sustained by federal employees in the performance of their duties. See 63 Stat. 861, 5 U.S.C. §757 (b) (now 5 U.S.C. §8116 (c) ). Apparently the exclusivity provision was a clarifying amendment to the F.E.C.A. See Johansen v. United States, 343 U.S. 427, 96 L.ed. 1051, 72 S.Ct. 849 (1952) and Patterson v. United States, 359 U.S. 495 3 L.ed. 2d 971, 79 S.Ct. 838 (1959).

Significantly, it must be noted that while the F.E.C.A. is to be the exclusive liability of the United States, it is conspicuously silent as to the liability of the fellow federal employees who tortiously caused the injury. Thus, the courts have held that federal employees who had received compensation under the F.E.C.A. retain their common law right to sue their fellow employee who negligently or tortiously caused the injury, even though the injured employee was not able to proceed

against the United States under the Federal Torts Claim Act. The leading case is Allman v. Hanley, 302 F. 2d 559 (5th Cir. 1962), where a civilian employee of the United States instituted an action against the medical officers of the United States Air Force and a civilian doctor employed by the air force for injuries sustained as a result of negligent surgery. The Circuit Court of Appeals held that the F.E.C.A. did not abrogate the common law right of the employee to sue his negligent fellow employees. The court, relying on State court cases, pointed out at pages 563-564:

> ". . . at common law servants mutually owed to each other the duty of exercising ordinary care in the performance of services and that they are liable for failures in that respect resulting in injury to a fellow employee. Most courts which have held the common law rule abrogated by workmen's compensation acts have done so on the basis of the wording of the particular statute in question." (Emphasis added)

The court, noting that the F.E.C.A. had no such wording, continued at page 564:

> "It would have been a simple matter for Congress to have placed the restrictive language in the statute here under examination if it had so intended." (Emphasis added)

Another noteworthy case upholding the right a federal employee to sue his fellow employee is Marion v. United States, 214 F.Supp. 320 (D. Md. 1963), which involved a cause of action arising before the 1961 enactment of the Federal Drivers Act. In Marion, the injured federal

employee brought an action against the United States and his co-employee for injuries sustained as a result of the negligence of the co-employee in the operation of a motorcycle in the course and scope of his employment as an air policeman. Summary judgment was granted as to the United States because of the exclusiveness of the F.E.C.A. remedy but denied as to the co-employee. The court stated that the policy problem as to whether or not the F.E.C.A. should deprive a federal employee of his right to sue fellow employees is left to Congress to resolve rather than the courts. The court shall not abrogate the common law right to sue a fellow employee for his tort where Congress has been silent on the subject.

It must be stressed that Congress has to date continued to remain silent and has not added any legislation to the federal compensation statutes abrogating the common law remedy against fellow employees.

Clearly, if the instant accident occurred prior to the 1961 enactment of the Federal Drivers Act, the plaintiff, Peter Noga, would have had his common law remedy in tort against his fellow employee, Dennis Bruce.

## B. IN 1961, THE FEDERAL TORTS CLAIM ACT WAS AMENDED BY THE ENACTMENT OF THE FEDERAL DRIVERS ACT PROVIDING THAT NO SUIT SHALL BE BROUGHT AGAINST A FEDERAL DRIVER FOR DAMAGES RESULTING FROM THE OPERATION OF A MOTOR VEHICLE WITHIN THE SCOPE OF HIS GOVERNMENT EMPLOYMENT AND ESTABLISHING A PROCEDURE FOR SUBSTITUTING THE UNITED STATES AS DEFENDANT IN PLACE OF THE FEDERAL DRIVER.

The Federal Torts Claim Act, enacted by Congress in 1946, provided a judicial remedy for the first time against the United States

for persons who suffered injury as a result of the negligence or misconduct of the employees of the United States. See 60 Stat. 842. With the enactment of the Federal Torts Claim Act, an injured person could now proceed against the United States as well as the negligent federal employee where the employee was acting within the scope of his employment. See Larson v. Domestic & Foreign Corp., 337 U.S. 682, 93 L.ed. 1628, 69 S.Ct. 1457 (1949), holding that federal employees are personally liable for their tortious conduct.

In 1961, Congress enacted the "Federal Drivers Act" so as to provide that no suit shall lie against a federal driver for damages resulting from his operation of a motor vehicle within the scope of his employment. 75 Stat. 539, 28 U.S.C. §§2679 (b)-(e).

Federal Drivers Act provides that remedy by suit against the United States shall be the exclusive action for injury resulting from the operation of a motor vehicle by the federal employee within the scope of his employment. 28 U.S.C. §2679 (b). Where the suit is filed against the federal driver, the Attorney General is required to defend the civil action and, where necessary, remove the suit to the federal courts. 28 U.S.C. §§2679 (c)-(d). The action against the federal driver is deemed to be a suit against the United States and the United States must be substituted as defendant in place of its driver. Litinski v. Partko, 237 F. Supp. 688 (D.C.Pa. 1965); Eastman v. United States, 257 F.Supp. 315.

C. THE PURPOSE OF THE FEDERAL DRIVERS ACT WAS TO PROTECT THE FEDERAL DRIVER BY SHIFTING FINANCIAL RESPONSIBILITY TO THE GOVERNMENT. THERE WAS NO EXPRESSION

OF INTENT TO ABROGATE THE JUDICIAL REMEDY OF INJURED FEDERAL EMPLOYEES WHO RECEIVED WORKMEN'S COMPENSATION.

The purpose of the Federal Drivers Act is stated in the Senate Report No. 736, 87th Congress, 1st Sess. (1961) at page 1:

> "The purpose of the Bill, as amended, is to provide a method for the assumption by the Federal Government of responsibility for claims for damages against its employees arising from the operation by them of motor vehicles in the scope of their government employment."

Clearly, Congress intended the legislation for the protection of its employees. The United States was to assume financial responsibility arising out of the operation of motor vehicles in the scope of government employment and thus relieve its drivers from hazards of personal liability stemming from driving motor vehicles in the course of official duty. See S. Rep. No. 736, 87th Con. 1st Sess. (1961); H. Rep. No. 297, 87th Con. 1st Sess. (1961); 1961 U.S.C. Con. and Adm. News 2784-2797. The legislative history and background of the Federal Drivers Act does not indicate any intent on the part of Congress to deprive injured persons, including federal employees, of any judicial remedy. In fact , the act itself expresses a clear intent to provide a substitute remedy. See Perez v. United States, 218 F. Supp. 571 (S.D. N. Y. 1963).

The Federal Drivers Act, as passed by Congress, represented a practical and logical way of meeting the problem of accomplishing the purpose of shifting the financial responsibility from the federal driver to the United States. Two other proposals were before Congress but were rejected because of the opinion that the Federal Drivers Act

offered greater simplicity in the administration with far less expense to the government than the other proposals. The two other proposals considered by Congress were: (1) indemnification of the employee driver by the government, or (2) insurance covering employees obtained at the government's expense. Both proposals were looked upon with disfavor for similar reasons. The proposal calling for indemnification by providing for payment by the government of any judgment rendered against an employee driver presented the likelihood of considerable difficulties in administration and heavy expense to the government and would permit jury trial. The other proposal providing for the procurement of liability insurance was believed to entail substantial and needless expense to the government. See S. Rep. No. 736, 87th Con. 1st Sess. (1961); H. Rep. No. 297 87th Con. 1st Sess. (1961); 1961 U.S.C.Con. and Adm. News 2784-2797.

Significantly, the only purpose of Congress as to the rejected proposals as well as the legislation enacted was to provide for the shifting of financial responsibility from the employee driver to the federal government. The means adopted (the Federal Drivers Act) to accomplish this purpose was selected over the rejected proposals merely because of efficiency and expense considerations. Certainly, if Congress enacted either of the alternative proposals there could be no doubt that appellant, Peter Noga, would still have his judicial remedy, even though he received compensation under the F.E.C.A. and that a judgment against Dennis Bruce would be satisfied by the government or by insurance. Nowhere does Congress consider the effect of the statute as applied to a federal employee who has received F.E.C.A.

benefits. The legislative history and background as well as the enacted legislation does not indicate any purpose or intent of depriving any one of his tort remedy including injured federal employees and should not be construed in such a manner.

D. THE INSTANT APPEAL PRESENTS AN ISSUE OF STATUTORY CONSTRUCTION AND INTERPRETATION OF FEDERAL DRIVERS ACT.

A federal employee whose injuries arise out of a fellow-employee's negligent operation of a motor vehicle within the scope of their employment can either maintain an action against the negligent federal driver, whereby the Attorney General would be required under the Federal Drivers Act to substitute the United States as defendant or maintain an action directly against the United States. The only contention by the appellee in opposition to the above is based upon the exclusivity provision of the F.E.C.A. Thus, an issue of statutory interpretation and construction is raised. As far as can be determined, this Court is the first appellate court asked to consider the question. Various results have been reached by the District Courts which have considered the question. See Gilliam v. United States, 264 F. Supp. 7 (E.D. Ky. 1967), Beechnut v. United States, 264 F. Supp. 926 (D. Mont. 1967), Noga v. United States, 272 F. Supp. 51 (N.D.Cal. 1967)(The District Court's opinion of the instant case) and the unpublished opinions incorporated as part of the record herein at pages 59-71.

Three possible constructions of the statutes in issue exist: (1) The federal employee can recover from the United States (by not applying the F.E.C.A.) but cannot recover from the federal driver (by applying the Federal Drivers Act), whereby the United States is

deemed substituted as defendant in place of the Federal driver. (2) The federal employee cannot recover from the United States (by applying the exclusivity provision of the F. E. C. A. ) nor from the fellow employee (by applying the Federal Drivers Act), thereby totally abolishing his judicial remedy in tort. (3) The federal employee can recover from his fellow employee (by not applying the Federal Drivers Act) but cannot recover from the United States (by applying the exclusivity provision of the F. E. C. A. ), thereby failing to carry out the purpose of the Federal Drivers Act.

The optimal construction and interpretation must be the one that carries out the purpose of the Federal Drivers Act in protecting federal employees while at the same time preserving the judicial recovery in tort of the appellant. Only the first construction accomplishes this. The latter two, as advocated by the appellee, fall short of the mark and should be rejected.

### E. THE CONSTRUCTION AND INTERPRETATION OF THE FEDERAL DRIVERS ACT ALLOWING APPELLANT'S CAUSE OF ACTION AGAINST THE FEDERAL DRIVER TO BE DEEMED AGAINST THE UNITED STATES AS A SUBSTITUTED DEFENDANT NOT ONLY FULFILLS THE PURPOSES OF THE STATUTE BUT PRESERVES APPELLANT'S EXISTING COMMON LAW RIGHTS BY PROVIDING AN EQUIVALENT JUDICIAL REMEDY AGAINST THE UNITED STATES.

1. <u>The first possibility -- the federal employee can recover from the United States (by not applying the F. E. C. A. ) but cannot recover from the federal driver (by applying the Federal Drivers Act), whereby the United States is deemed substituted as defendant in place of the federal driver.</u>

In the instant action, the United States is but a technical defendant in place of its federal driver, Dennis Bruce, pursuant to the dictates of the Federal Drivers Act. Appellant's right to maintain the action is supported by analytical reasoning, congressional intent, and the decisional law of the Supreme Court of the United States.

The congressional intent has been fully discussed heretofore. See supra at pages 11-14. It will suffice to state here that Congress' only purpose in enacting the Federal Drivers Act was to protect federal employees by shifting the financial responsibility to the United States for injuries sustained through the culpability of federal drivers. Congress has not expressed any intent to deprive any injured person completely of his judicial remedy for his injuries. It would be inconsistent with logic to interpret Federal Drivers Act, clearly enacted for the benefit of federal employees, as depriving federal employees of their existing rights for full judicial recovery where their injury was caused through the negligence of a fellow employee. It cannot be disputed that the purpose of the Federal Drivers Act is fully accomplished by permitting appellant to proceed against the United States in place of Dennis Bruce.

Further, such an interpretation of the statute avoids violating the long-standing judicial rule of construction whereby the courtsshall not abrogate common law rights where Congress is silent on the subject. See Allman v. Hanley, 302 F. 2d 559 (1962)and Marion v. United States, 214 F. Supp. 320 (1963). The F. E. C. A. does not contain any language abrogating the common law cause of action in tort by one employee against a fellow employee for the latter's negligence. If Congress had intended to do so, it would have been a simple matter to place such

restrictive language in the F. E. C. A. at the time of the enactment of the Federal Drivers Act.

There is ample decisional law permitting judicial recovery against an employer where Congress has enacted a system of compensation as the expressed exclusive remedy against the employer. In Jackson v. Lykes Steamship Co., 386 U.S. 731, 18 L.ed.2d 488, 87 S. Ct. 1419 (1967), the Supreme Court held that an action for the wrongful death of a longshoreman alleging negligence and unseaworthiness against the shipowner employer was not precluded by §5 of the Federal Longshoremens and Harbors Workers Compensation Act (33 U.S.C. §905) which provides that compensation benefits to longshoremen under that act "shall be exclusive and in place of all other liability of such employer to the employee . . ." In that case, the longshoreman inhaled noxious gasses and died while working on his employer's vessel on navigable waters. The trial court dismissed the suit on the grounds that the exclusive remedy provision of the longshoremen's act barred an action against the shipowner employer. The Supreme Court granted certioriari, reversed the judgment, and remanded the case for further proceeding. The court's decision, following its earlier opinion in Reed v.Steamship Yaka, 373 U.S. 410, 10 L. ed 2d 448, 83 S. Ct. 1359 (1963) was founded upon the basic unfairness of having recovery depend upon the fortuitous circumstances of how a longshoreman was employed. The court stated as 18 L. ed 2d at page 491:

> " . . . Yaka also stressed the fact that the traditional humanitariam remedy for unseaworthiness was not to be destroyed by the kind of employment contract that a

> "shipowner made with the people who worked on it.
>
> "In this case as in Yaka, the fact that the longshoreman was hired directly by the owner instead of by the independent stevedore company makes no difference as to the liability of the ship or its owner. In the final analysis the contention here against recovery as in Yaka is that the longshoreman who is employed to work on a ship by an independent stevedore company instead of the shipowner can recover for the unseaworthiness of the vessel, but a longshoreman hired by the same shipowner to do exactly the same kind of work on an unseaworthy ship cannot recover. We reject this contention as we did before. We cannot accept such a construction of the Longshoremen's Act--an Act designed to provide equal justice to every longshoreman similarly situated. We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this congressional Act."
>
> (Emphasis added)

The same result was reached earlier in Reed v. Steamship Yaka, 373 U.S. 410, 10 L.ed.2d 448, 83 S.Ct. 1349 (1963), which involved a libel in rem filed by a longshoreman to recover for injuries he sustained while engaged in loading a vessel. In that case the shipowner was the employer of the longshoreman. The sole defense was that the longshoremen's act provides that the compensation benefits under the act shall be exclusive and in place of all other liability on the part of the employer. The court held that the exclusive remedy provision of the Longshoremen's Act does not bar recovery for the traditional

humanitarian remedy for the unseaworthiness of a ship.

It is significant that the exclusive remedy provision of the Federal Employees Compensation Act is substantially identical to the language of the Longshoremen's Act. Both provide that the liability of the employer "shall be exclusive, and in place of, all other liability of" the employer to the employee. Jackson and Yaka stand for the principle that an exclusive remedy provision enacted by Congress in a compensation legislation must not be interpreted to bring about a harsh and incongruous result not in keeping with the congressional intent to provide certain protections for injured persons. Similarly, in the instant case, a fair and just result can only be achieved by holding that appellant's action in tort against the United States is not precluded by the exclusive remedy provisions of Section 5 U.S.C. §757 (b).

Certainly, it was not the intent of Congress in enacting the Federal Drivers Act to provide that the judicial recovery in tort by an injured federal employee in the performance of his duties shall depend upon the kind of accident. The fact that the federal employee sustained his injuries as a result of a vehicular accident rather than a non-vehicular accident should make no difference in his right to recover for the negligence of a fellow employee in causing the injury. As long as the injured federal employee is entitled to a judicial recovery in negligence for non-vehicular injuries, the same right must exist in the case of the motor vehicle accident. By permitting the appellant to pursue his judicial remedy by substituting the United States as defendant in place of the negligent federal driver, a harsh and incongruous result based solely upon fortuity is avoided.

An injured federal employee must be permitted the right to maintain an action against the United States where the injury was caused by the negligent operation of a motor vehicle by a fellow employee in the course and scope of their employment. Only then can the purpose of Congress in acting the Federal Drivers Act be carried out fully while at the same time arriving at a just and equitable result.

2. The second possibility -- the federal employee cannot recover from the United States (by applying the exclusivity provision of the F. E. C. A.) or from the fellow employee (by applying the Federal Drivers Act) thereby totally abolishing his judicial remedy in tort.

The second possibility barring recovery from both the United States and the fellow employee not only results in a harsh and incongruous interpretation of the statute in question but is in violation of certain constitutional guarantees of due process under the fifth amendment to the Federal Constitution as well as in violation of the historical maxim that courts do not abrogate common law rights where Congress remains silent.

A spurious argument might be urged that the second possibility fulfills the purpose of the Federal Drivers Act as it relieves the federal driver from financial responsibility. But such an argument ignores the congressional intent that the United States was to assume the responsibility by providing a substitute remedy, thus clearly indicating that Congress did not intend to deprive injured persons of their judicial remedy. An interpretation precluding all recovery in tort to an injured federal employee is contrary to the congressional purposes.

Furthermore, a construction barring all recovery would fly in

the face of the long-standing principle that the abrogation of common law rights are best left to Congress and that the court shall not annul such rights where Congress is silent on the subject. See Allman v. Hanley, supra, and Marion v. United States, supra, and discussion supra at pages 9-11.

If the Federal Drivers Act be construed as barring recovery by appellant both from the United States and the negligent fellow employee, such construction would be unconstitutional, as it would be abolishing a vested right (appellant's cause of action for negligence against a fellow employee) without due process of the law as protected by the fifth amendment to the Federal Constitution. The Supreme Court has long held that it is the court's duty in interpreting federal statutes to reach a conclusion which will avoid serious doubt of the statutes constitutionality. Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 72 L. ed 303 (1928), Phelps v. United States, 274 U.S. 341, 71 L. ed 1083 and Crowell v. Benson, 285 U.S. 22, 76 L. ed 598 (1932).

Such an interpretation would result in taking away a lawful claim for damage for injury against a private person, which but for the Federal Drivers Act he would have against the private wrongdoer. The question of unconstitutionality would be raised by the second possibility's failure to provide a substantial and effective equivalent in place of what would be taken away when applied to the injured federal employee. The objection would not be present when the injured person is not a federal employee as in that case there would be a substantial and effective equivalent remedy against the United States.

The case in point is Richmond Screw Anchor Co. v. United States,

supra, involving a statutory interpretation of federal statutes under an analagous situation. In that case, three statutes were involved. The first enacted statute , Section 3477, Revised Statutes, U.S.C., Title 31, §203, prohibited assignment of unliquidated claims against the United States. The statute had previously been held applicable to claims for infringement of patents, thereby rendering such claims void. The second statute was the Act of 1910 providing that an invention covered by a patent of the United States could be used by the United States without license and that the owner shall recover reasonable compensation from the United States in the court of claims. The last statute, the Act of 1918, amended the Act of 1910 by providing that the remedy against the United States in the Court of Claims shall be the exclusive remedy of the owner for infring ment of the patent. The purpose of the latter act was to relieve government contractors who used patents without a license under the Act of 1910 from any liability so as to stimulate contractors to furnish what was needed for war without fear of becoming liable for any infringement to the owners or assignees of owners of patents. Appellant was the assignee of a patent and was seeking to recover compensation from the United States for patent infringements by a government contractor incurred after the 1918 Act. The United States argued that Section 3477 applied and rendered the assignment of the claim for infringement of patent void. If the argument prevailed, appellant would have been barred completely as the Act of 1918 precluded his cause of action against government contractor. Such a result could only be avoided by not applying Section 3477 and holding that the Act of 1918 provided a just equivalent by allowing a claim against the United States in place of the claim against the

government contractor. The court held that Section 3477 shall not apply to claims for patent infringements by government contractors after the enactment of the Act of 1918. The pertinent language of the court is found at pages 344-346:

> "It is settled that, but for the Act of 1918, the two assignments vesting title in the Anchor Company would enable it to recover from the contractor for all his infringements ... If now §3477 applies and these assignments are rendered void, the effect of the Act of 1918 is to take away from the assignee and present owner not only the cause of action against the government, but also to deprive it of the cause of action against the infringing contractor for injury by his infringement. The intention and purpose of Congress in the Act of 1918 was to stimulate contractors to furnish what was needed for the war, without fear of becoming liable themselves for infringements to inventors or the owners or assigness of patents. . . To accomplish this governmental purpose, Congress exercised the power to take away the right of the owner of the patent to recover from the contractor for infringements. This is not a case of mere declared immunity of the government from liability for its own torts. It is an attempt to take away from a private citizen his lawful claim for damage to his property by another private person, which but for this act he would have against the private wrongdoer. This result, if §3477, Rev. Stat. applies and avoids the assignment,

"would seem to raise a serious question as to the constitutionality of the Act of 1918 under the 5th Amendment to the Federal Constitution. We must presume that Congress in the passage of the Act of 1918 intended to secure to the owner of the patent the exact equivalent of what it was taking away from him. It was taking away his assignable claims against the contractor for the latter's infringement of his patent. The assignability of such claims was an important element in their value and a matter to be taken into account in providing for their just equivalent. If § 3477 applied, such equivalence was impossible.

"It is our duty in the interpretation of Federal statutes to reach a conclusion which will avoid serious doubt of their constitutionalty. . . Moreover, we should seek to carry out in our dealing with the Act of 1918 and Revised Statute, § 3477, the very important congressional purpose of the former, as already explained, in the promotion of the war as a special legislative intent. It is our duty to give effect to that special intent, although it be not in harmony with a broad purpose manifested in a general statute avoiding assignment of claims against the government enacted some eighty years ago. . . This is in accord with general rules of interpretation, as shown in these authorities, and reconciles § 3477, Revised Statutes, and the Act of 1918, if we hold, as we do, that § 3477

> "does not apply to the assignment of a claim against the United States which is created by the Act of 1918, in so far as the act deprives the owner of the patent of a remedy against the infringing private contractor for infringements thereof and makes the government indemnitor for its manufacturer or contractor in his infringements."

Applying the above reasoning to the instant case, Section 3477 of the Rev. Stat. has the same function as the exclusive remedy provision of the F.E.C.A. The Act of 1918 has the corresponding effect of the Federal Drivers Act. The right of the assignee of a patent to recover from a government contractor for an infringement of a patent prior to the Act of 1918 despite § 3477 requires that injured federal employees, such as the appellant, have the right to recover from a negligent Federal Drivers Act despite exclusive remedy provision of F.E.C.A. In Richmond Screw Anchor Company, the purpose of the special statute (Act of 1918) was given priority as must the purpose of the Federal Drivers Act herein. In order to avoid serious doubt of constitutionality the Act of 1918 was interpreted as providing a just equivalent-claim against the United States in place of the claim against the government contractor. In the instant case, the Court must interpret the statute to provide that the appellant received a just equivalent - an action against the United States as defendant in place of the action against the federal driver.

3. The third possibility - the federal employee can recover from his fellow employee (by not applying the Federal Drivers Act)

but cannot recover from the United States (by applying the exclusivity provision of the F.E.C.A.), thereby failing to carry out the purpose of the Federal Drivers Act.

The remaining possibility whereby an injured federal employee can proceed against his fellow employee but not the United States by not applying the Federal Drivers Act must also be rejected. While not objectionable as abrogating a common law right, it does fail to satisfy the purpose of the Federal Drivers Act to shift the responsibility for the negligent operation of motor vehicles from the federal driver to the United States. Obviously, the intent of Congress is to relieve its drivers from hazards of personal liability and protect against financial disaster in all situations where the accident is in the course of official duty.

In the case where the injured party is a fellow employee, the federal driver's need for the protection of the Federal Drivers Act is far greater than in the case where the injured person is not a fellow employee. In the latter situation, where the federal driver had insufficient insurance, the injured person would be satisfied with his remedy against the financially solvent United States to satisfy any judgment. Thus, the federal drivers would not be exposed to bankruptcy or the threat of an outstanding judgment which might be satisfied out of his assets or any inheritance or other financial benefits which might be received in the future.

But where the injured person was a fellow federal employee, the federal driver was in a more critical position, as the injured fellow employee had only his remedy against him. Thus, the satisfaction of a judgment out of federal driver's assets was a very real threat which

could result in bankruptcy, impairment of credit and depletion of savings and loss of inheritance and other financial benefits in the future.

The federal driver would most likely not even have a choice as to whether or not other fellow employees would ride in his vehicle during their employment. Thus, the third possibility must also be rejected for it not only fails to carry out the purposes of the Federal Drivers Act but would be a harsh and incongruous result as to the federal driver.

### F. THE INESCAPABLE CONCLUSION IS THAT JUSTICE AND LOGIC CAN ONLY BE SERVED BY ADOPTING THE OPTIMAL CONSTRUCTION AND INTERPRETATION OF THE FEDERAL DRIVERS ACT WHEREBY AN INJURED FEDERAL EMPLOYEE CAN PROCEED DIRECTLY OR INDIRECTLY AGAINST THE UNITED STATES IN PLACE OF THE FEDERAL DRIVER UNDER THE PROCEDURE ESTABLISHED BY THE FEDERAL DRIVERS ACT FOR INJURIES SUSTAINED THROUGH THE NEGLIGENT OPERATION OF A MOTOR VEHICLE.

Gilliam v. United States, 264 F. Supp. 7 (E.D. Ky. 1967) represents an apocalyptic result combining analytical reasoning and congressional intent to reach a sound and just construction of the application of the Federal Drivers Act under the identical facts whereby the injured federal employee is able to pursue the United States as defendant substituted in place of the federal driver. Appellant's position can best be summarized by adoption of the language contained in that opinion. At page 9, the court stated:

> "Now we find a situation in which if the Court followed the reasoning of the United States Attorney's argument

would deny Miss Green any right of recovery at all, irrespective of how gross the negligence, irrespective of how seriously she may have been injured, she would have no grounds for recovery. All she could expect would be under the compensation law, payment for her hospital bill and medical expenses. I can't conceive of placing a construction or interpretation upon an act of Congress made primarily for the protection of its own employees that would deny another employee a right to make a claim for a just recovery. This woman had a right at common law, she had a right of action at common law, and here by a strained, as I believe, construction, she is denied that right without any direct and express act of Congress on the point. In other words, while they pay to her her hospital bill and medical expenses, they say to her, "We are going to construe this law and the Congress intends in this law to deny an employee of the United States any right to recover for personal injuries'solely on the ground that you are an employee of the United States Government.' It is a very ancient legal maxim that there shall be no wrong without a remedy. It is the body of the whole law that is built around that idea and principle and yet to interpret this compensation law in such a way would deny a common law right of action to one of the government employees, solely on the ground that the United States in another act, another statute, had volunteered itself to replace or supplant any of its employees who might

be sued for damages growing out of an automobile injury." The court continued at page 10:

"Under these facts and circumstances, it is my judgment that inestimable wrong would be done Mrs. Gilliam by denying her the right to seek redress for her alleged injuries, growing out of the alleged negligence of the operator of the car in which she was compelled to ride, by denying her the right to prosecute a common law action for a tort against her in the forum of her choosing. I do not believe the Congress intended to go so far in its enactment of the compensation or substitution statute when it was in the minds of the legislators that they were passing enactments for the benefit of employees and not to foreclose their right to seek redress for wrongs committed against them. The state compensation laws are for immediate aid to the injured employee and as a protection to the employer. There is no parallel between these laws and the federal laws which the United States seeks to impose here as a means of denying an allegedly just claim.

"I subscribe to the language of the Court in Brady v. Roosevelt S.S.Co., 317 U.S. 575: 'We can only conclude that if Congress had intended to make such an inroad on the rights of claimants . . . it would have said so in unambiguous terms' and 'in the absence of a clear congressional policy to that end, we cannot go so far'." (Emphasis added)

It is respectfully submitted that appellant can proceed directly against the United States which is deemed defendant in place of the federal driver. The judgment in favor of the United States must therefore be reversed for the reasons contained herein.

Dated, San Francisco, California,

March 18, 1968.

HOBERG, FINGER, BROWN & ABRAMSON
By JAMES D. MART,
Attorneys for Appellant.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

James D. Mart, Attorney for Appellant

# AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

GLORIA RIVARD being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco, and not a party to the within action. This affiant's business address is 703 Market Street, 18th floor, San Francisco, California. That affiant served a copy of the foregoing Brief for Appellant by placing said copy in an envelope addressed to Morton Hollander and William Kanter, Appellate Section, Civil Division, Room 3706, U. S. Department of Justice, Washington 25, D. C. and Cecil F. Poole and Robert N. Ensign, 450 Golden Gate Avenue, San Francisco, California, which envelopes were then sealed and postage fully prepaid thereon, and thereafter was on March 19, 1968 deposited in the United States mail at San Francisco, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Gloria Rivard

Subscribed and sworn to before me
this 19th day of March, 1968

Maureen Curtin
Notary Public
in and for the City and County of San
Francisco, State of California

MAUREEN CURTIN
Notary Public
City & Co. of San Francisco
State of California